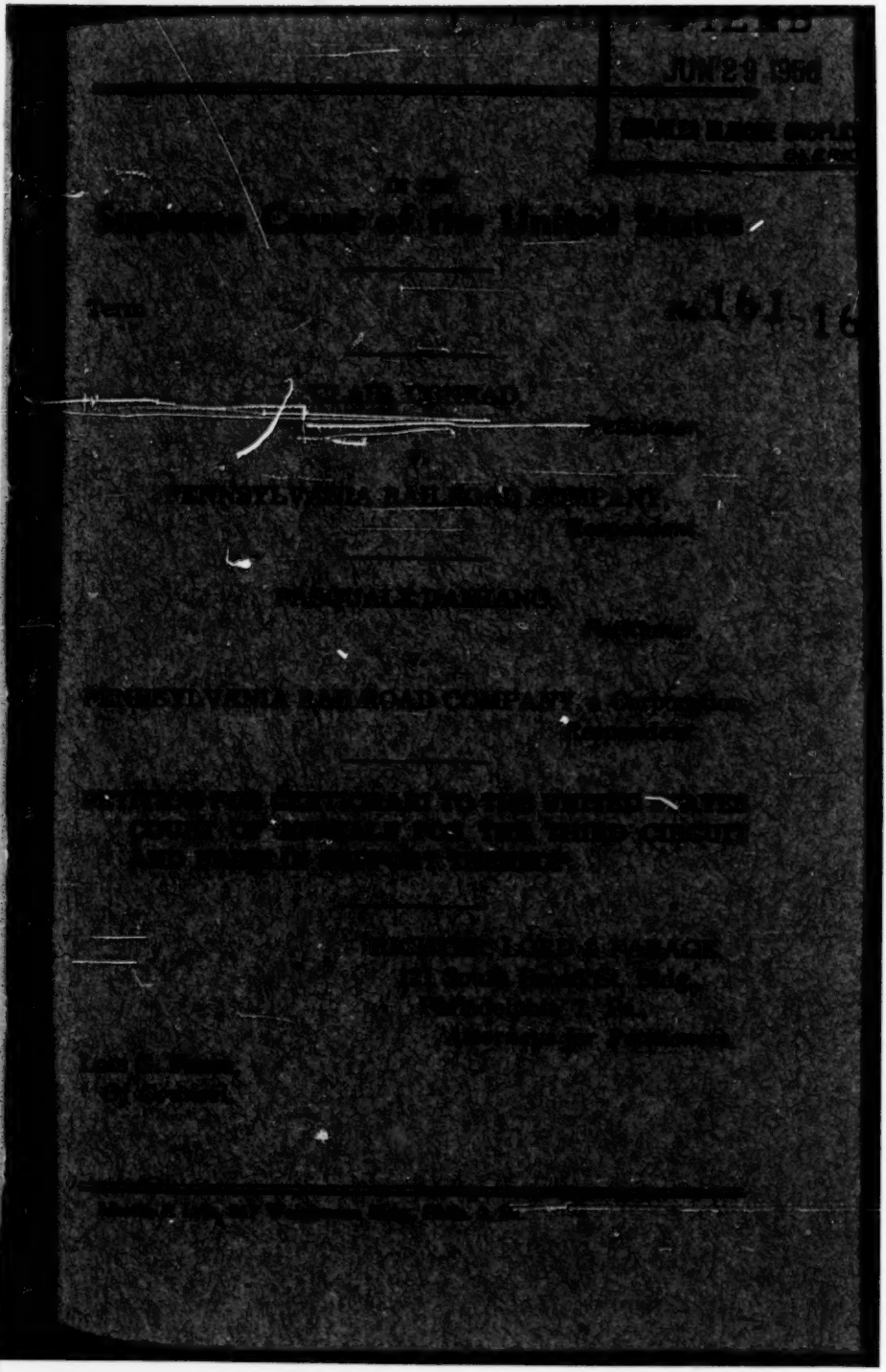

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IN THE

SUPREME COURT OF THE UNITED STATES.

Term No.

CLAIR CONRAD,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY, a Corporation,

Respondent.

PASQUALE DAMIANO,

Petitioner,

v.

PENNSYLVANIA RAILROAD COMPANY, a Corporation,

Respondent.

PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Clair Conrad and Pasquale Damiano, by their attorneys, pray that writs of certiorari issue to review the orders of the United States Court of Appeals for the Third Circuit entered in the above entitled cases on April 14, 1950.

OPINIONS BELOW.

The opinion of the United States District Court for the Eastern District of Pennsylvania is unreported. The opinion of the United States Court of Appeals for the Third Circuit is reported in 161 F. 2nd 234. Certiorari was denied, 332 U. S. 762. The Orders of the Court of Appeals for the Third Circuit denying plaintiffs' motions in the nature of a bill of review were entered April 14, 1950 and have not been reported.

JURISDICTION.

The Orders of the Circuit Court of Appeals for the Third Circuit were entered on April 14, 1950. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925; 28 U. S. C. A. Section 347 (a).

QUESTIONS PRESENTED.

1. Where an injured employee of an interstate railroad, without benefit of legal counsel, entered into a Pennsylvania Workmen's Compensation agreement prepared by the railroad, and where the employee was induced to enter into such an agreement by fraudulent misrepresentations of the railroad that the employee had no other legal remedy, but where the employee discovered more than three years after his injury the applicability of the Federal Employers' Liability Act, did not such fraud by the defendant railroad toll the limitations of the Federal Employers' Liability Act?

2. Under the recited circumstances, did not resort by defendant railroad to the agreement, with the purpose and effect of procuring the operation of the statute of limitations, so contravene Section 5 of the Federal Employers' Liability Act (45 U. S. C. A. 55) as to prevent defendant from invoking the statute of limitations?

3. Where the United States Court of Appeals for the Third Circuit under the recited circumstances, ruled as a matter of law that fraud would not toll the limitations of the Federal Employers' Liability Act and that Section 5 of said Act was not so contravened by said fraud as to prevent the defendant from invoking the statute of limitations, did not these rulings constitute error apparent on the face of the record requiring the Court to grant plaintiffs' motion in the nature of a bill of review?

STATUTES INVOLVED.

Sec. 6 of the Federal Employers' Liability Act (45 U. S. C. A. 56) provides:

> "No action shall be maintained under this Chapter unless commenced within three years from the day the cause of action accrued."

Sec. 5 of the Federal Employers' Liability Act (45 U. S. C. A. 55) provides in part:

> "Any contract, rule, regulations, or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Chapter, shall to that extent be void * * *."

Rule 60 (b) of the Federal Rules of Civil Procedure provides in part:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U. S. C. A., Sec. 1655, or to set aside a judgment for fraud upon the court."

The Seventh Amendment to the Constitution of the United States, in its pertinent parts, provides:

> "In suits at common law * * * the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law."

STATEMENT OF FACTS.

Only two issues are raised by these two companion cases:

1. Are the claims barred by the three-year statute of limitations?

2. If not, has the United States Court of Appeals power to correct its error in denying the claims?

Conrad was injured in Pennsylvania, on October 12, 1941, while in the employ of the Pennsylvania Railroad Company, and suit was started on his behalf in the U. S. District Court for the Eastern District of Pennsylvania on June 12, 1946. Damiano was injured also while in the employ of the same railroad, on November 4, 1942, and his suit was started in the same Court on May 16, 1946. Both actions were dismissed by that Court on Defendant's motion, on the ground that they were barred by the statute of limitations.

Because both cases raised essentially the same issues, the District Court considered them together, and by stipulation of counsel, appeals to the United States Court of Appeals (Third Circuit) were consolidated. Motions in the nature of a bill of review were also considered together.

In the Conrad case, shortly after the accident, at the defendant's suggestion, in the absence of legal counsel to represent the plaintiff, and while plaintiff was in the hospital, plaintiff entered into a workmen's compensation agreement with the defendant.

In the Damiano case, shortly after plaintiff returned home from the hospital, and while he was still incapacitated, defendant's claim agent visited him and, in the absence of any legal counsel to represent Damiano, induced him to sign a workmen's compensation agreement, despite protests by Damiano.

In neither case did defendant tell or intimate to either plaintiff that he had any rights under the Federal Employers' Liability Act, and on the contrary, both men were told that their only remedy was for compensation. Upon discovery of the applicability of the Federal law, both of the plaintiffs promptly instituted action.

In both cases, because three years had passed from the time of the injury until the starting of the Federal action, defendant moved to dismiss the action on the ground that the action was barred by the statute of limitations. The lower Court granted the motions to dismiss. The United States Court of Appeals (Third Circuit) affirmed. Petitions for Certiorari were denied.

The United States Court of Appeals for the Fourth Circuit, in *Scarborough v. Atlantic Coast Line Railroad Company,* 178 F. 2d 253, declined to follow the ruling of the Court of Appeals for the Third Circuit in the instant cases, and held that fraud on the part of the defendant tolled the limitations imposed by Sec. 6 of the Federal Employers' Liability Act, and further that such fraud contravened the provisions of Sec. 5 of the Act so as to prevent the defendant from invoking the limitations of Sec. 6. Certiorari was denied.

On motions in the nature of a bill of review, Conrad and Damiano alleged, citing *Scarborough v. Atlantic Coast Line Railroad Company,* that error apparent is on the face of the record, and prayed that the order dismissing the complaints be reversed and the causes remanded to the District Court. The motions were denied.

SPECIFICATIONS OF ERROR TO BE URGED.

The Court of Appeals erred in the following respects:

1. In holding that fraud on the part of the defendant does not toll the limitations of the Federal Employers' Liability Act.

2. In holding that the defendant railroad may invoke the statute of limitations notwithstanding petitioners' contention that they were lulled into inaction by the Workmen's Compensation agreement, procured by the railroad in violation of Section 5 of the Federal Employers' Liability Act.

3. In denying the plaintiffs' motions in the nature of a bill of review to reverse the order dismissing the complaint and to remand the cause to the District Court for further proceedings.

REASONS URGED FOR GRANTING THE WRIT.

1. The decision of the United States Court of Appeals (Third Circuit) as to whether fraud on the part of the defendant tolls the limitations of the Federal Employers' Liability Act and contravenes Sec. 5 of the Federal Employers' Liability Act, is in conflict with *Scarborough v. Atlantic Coast Line Railroad Company*, 178 F. 2d 253 (C. C. A. 4, 1949), certiorari denied (not yet reported).

2. The denial by United States Court of Appeals (Third Circuit) of the motions in the nature of a bill of review to correct error apparent on the face of the record contravenes 60 (b) of the Federal Rules of Civil Procedure, which preserves by motion the substantive relief afforded by a bill of review.

3. Petitioner's constitutional guarantee of trial by jury has been violated.

4. Recent cases before this Court dictated the necessity for amending Rule 60(b) of the Federal Rules of Civil Procedure. As amended, there is a clear present necessity for interpretation of the amendment so that the intermediate appellate courts may uniformly appraise its scope, meaning and significance.

BRIEF.

ARGUMENT.

I.

The limitations of the Federal Employers' Liability Act whether denominated substantive or procedural may be tolled by fraudulent conduct on the part of the defendant in violation of section 5 of the act.

Section 5 of the Federal Employers' Liability Act voids the agreements entered into by these plaintiffs under the Workmen's Compensation Act. This section provides in part that "any contract, rule, regulations or device whatsoever, the purpose or intent of which shall be to enable any common carrier to exempt itself from any liability created by this Chapter, shall to that extent be void." The language is broad and inclusive. The conduct of a railroad in fraudulently deceiving employees as to their rights by leading them to believe that their sole remedy is the limited recovery permitted by the Workmen's Compensation Act, certainly is a device by which the railroad exempted itself from a large measure of liability. Section 5 is meaningless if the defendant railroad may violate it with impunity and then proceed to claim other benefits of the Act. To hold that fraud tolls the limitations of the Act is consonant with the purposes of Section 5.

This Court in *Boyd v. Grand Trunk Western R. Co.*, 70 S. Ct. 26 (1950), held that an agreement between a railroad and its employees whereby the employee was to bring suit only where he resided or where the injuries were sustained, violated Sec. 5 of the Act. Any limitation upon the em-

ployee's right to sue was thus properly considered a violation of Sec. 5.

Mr. Justice Black, in *Duncan v. Thompson,* 315 U. S. 1 (1942), declared that Section 5 was a remedial statute enacted for the benefit of plaintiffs and as such should be given a broad interpretation. In the cited case, a covenant not to sue unless the sum paid by the defendant to the plaintiff as living expenses had been returned, was held to violate this section. See also, *Irish v. Central Vermont Ry., Inc.,* 164 F. 2d 837 (C. C. A. 2, 1947). Note that this Court in the Boyd case specifically distinguished *Callen v. Pennsylvania R. Co.,* 332 U. S. 625 (1948) pointing out that nothing in the Callen decision impaired the vigor and validity of *Duncan v. Thompson.* The Callen case involved a full compromise and settlement and did not obstruct plaintiff's rights under the Act to secure maximum recovery if he should elect a judicial trial. In the instant cases, the plaintiffs allege serious violations of the letter and spirit of Section 5, since the conduct of the defendant was clearly designed not merely to limit the employees' access to a particular court but completely to exempt defendant from liability.

Fraud on the part of the defendant tolls a substantive statute of limitations. Distinctions between substantive and procedural statutes of limitations are conceptualistic and ill-suited to modern remedial legislation such as the Federal Employers' Liability Act. The law is clear that fraud on the part of a defendant tolls a procedural statute of limitations. The theory of the substantive statute is, of course, that when the time expires, the rights created by the Act are no longer extant. However, in extraordinary circumstances, statutes of limitations denominated substantive have been tolled. This Court has tacitly recommended the implausibility of the theory.

In *Hanger v. Abbott,* 73 U. S. 532 (1867), the Court held that the Civil War tolled the statute of limitations. A plaintiff in New Hampshire brought an action in assumpsit

against a defendant in Arkansas, and because of the war was unable to have the defendant served with process. The Court held that the statute of limitations was tolled and pointed out that this ruling was a departure from the common law doctrine; namely, that even the non-existence of the courts cannot bar the running of a substantive statute of limitations.

In more recent cases, so called substantive statutes of limitations have also been tolled by extraordinary circumstances. In *Osborne v. United States*, 146 F. 2d 767 (C. C. A. 2, 1947), a seaman interned during the war was unable to bring suit within the period of the Jones Act. The Court held that the limitations of the act were substantive but tolled by the recited facts. Obviously, if the rights and remedies of the act no longer existed after the period of limitations, it would be immaterial where the plaintiff was and under what circumstances he was denied access to the courts. Such a callous disregard of circumstances beyond the plaintiff's control was not even suggested by the Court. Similarly, in *Frabutt v. N. Y., Chicago and St. Louis R. Co.*, 84 F. Supp. 460 (D. C. W. D. Pa. 1949), the alien heirs of a deceased railroad worker were residents of Italy and were unable to institute action under the Federal Employers' Liability Act during the war. The Court held that under these circumstances the limitations of the act were tolled. In all of these cases, the plaintiffs were denied access to the courts. Conrad and Damiano allege that they also were denied access to the courts by circumstances beyond their control, namely, the defendant's fraudulent conduct. Not only should these plaintiffs not be denied their action, but also, the defendant guilty of such fraud should be estopped to claim the benefits of his conduct.

Scarborough v. Atlantic Coast Line R. Co. correctly states the law. The facts of the Scarborough case and the allegation of the complaints in the instant cases are strikingly similar. The defendant in the Scarborough case fraudulently persuaded the plaintiff to delay filing suit until he

reached his majority. The plaintiff was seventeen years old at the time of the accident. Upon reaching his twenty-first birthday, the plaintiff promptly brought suit and the defendant pleaded the statute of limitations. The Court refused to permit the defendant to profit by his fraud and declined to follow the instant cases.

The defendant, Pennsylvania Railroad, in its argument below, attempted to distinguish the Scarborough case on the facts. Since the instant cases were dismissed on motion, the plaintiffs' allegations must be taken as true. The plaintiffs have sought in their various appeals simply an opportunity to have a day in court in which to prove the truth of these allegations.

Plaintiffs have been denied their right of trial by jury as guaranteed by the Seventh Amendment to the Constitution. In all of the proceedings in these cases, plaintiffs have continually sought to have a trial on the issues before a jury. This has been denied them in violation of their constitutional rights.

Allegations of fraud are not lightly to be dismissed. In *Hazel Atlas v. Hartford Empire*, 322 U. S. 238 (1944), this Court, upon allegations of fraud upon the court, granted a bill of review to reopen a decree nine years after it was entered. In *Hazel Atlas v. Hartford Empire*, the hoary and obfuscating distinction between extrinsic and intrinsic fraud was abolished. Rule 60 (b) of the Federal Rules of Civil Procedure adopts the law of this case. The distinction between substantive and procedural statutes of limitations, similarly beclouding the issues and denying relief, should not be permitted to deny plaintiffs their day in court.

It is respectfully urged, therefore, that the allegations of fraud upon the part of the defendant constitute a violation of Sec. 5 of the Federal Employers' Liability Act and are the type of extraordinary circumstances which toll even a substantive statute of limitations.

II.

A motion in the nature of a bill of review to correct error apparent on the record is a remedy to relieve a party from a final judgment, order or proceeding preserved by Rule 60 (b) of the Federal Rules of Civil Procedure.

The revision of rule 60 (b) was designed to clarify and restate the right of the Federal courts to grant relief from judgments. Following the decision in *Hazel Atlas v. Hartford Empire,* rule 60 (b) was revised not only to reflect the abolition of the distinction between extrinsic and intrinsic fraud, but also clearly to state that the right of the courts to grant relief from judgments was unimpaired by the adoption of the Rules of Civil Procedure. The purpose of the amendment to rule 60 as stated in the Notes of Advisory Committee on Amendments to Rules, was "to permit, either by motion or independent action, the granting of various kinds of relief from judgments which were permitted in the federal courts prior to the adoption of these rules * * *," 28 U. S. C. A. foll. Sec. 723 (c).

Rule 60 (b) specifically abolishes writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of bills of review, and provides that the relief granted by these actions is now to be procured under Rule 60 (b) by motion. All of these remedies have been continually available in the federal courts. *U. S. v. Steese,* 144 F. 2d 439 (C. C. A. 3, 1944) (coram nobis and coram vobis); *Jones v. Watts,* 142 F. 2d 575 (C. C. A. 5, 1944) (audita querela); *Parks v. Parks,* 98 F. 2d 235 (C. A., D. C., 1938); and *Wallace v. U. S.,* 142 F. 2d 240 (C. C. A. 2, 1944) (bill of review). Thus the Rules of Federal Procedure preserve the right to grant relief from a judgment, order or proceeding and provide that the procedure shall be by motion. See 3 Moore, Federal Practice, 3274, 3275.

This significant amendment has not been interpreted by

the Supreme Court. It is respectfully urged that a decision sustaining this historic power of the courts to remedy injustice, carrying out the implications of the Hazel Atlas decision and the clear mandate of revised Rule 60 (b) is desirable and necessary.

The bill of review was granted to correct error apparent on the face of the record. Since the instant cases were heard only upon motion, the error, if any was committed, is clearly an error apparent in the record. No issue of fact is raised. A question of statutory construction does raise such an issue of error of law. *Rudolph v. Hunt*, 286 F. 1007 (C. A., D. C., 1923).

The bill of review for error apparent is a matter of right and may be filed without leave of court. Davis v. Speiden, 104 U. S. 83 (1881); *Ricker v. Powell*, 100 U. S. 104, 109 (1879); *In re Brown*, 213 F. 701 (D. C., S. D. N. Y., 1913); *U. S. v. Haas*, 58 F. Supp. 179 (D. C., N. Y. 1944); 3 Moore, Federal Practice 3262.

Only laches or neglect will bar the granting of a meritorious bill of review. There has never been any express limitation as to the time in which a bill of review could be filed. The courts have recognized that the bill, an equitable remedy, was not strictly within the statute of limitations; the criterion for a timely filing was the absence of laches or neglect. *Thomas v. Brockenbrough*, 10 Wheat. 146 (1825); *Central Trust Co. v. Grant Locomotive, Inc.*, 135 U. S. 207 (1890). See also 3 Moore, Federal Practice 2661.

Rule 60 (b) of the new rules severely limits the availability of relief from judgments or orders in certain categories. Under the usual construction of *inclusio unius est exclusio alterius*, the substantive relief of the bill of review is not to be limited by any arbitrary statute or term of court. Note that the decision of the Court of Appeals for the Second Circuit in *Wallace v. U. S.*, 142 F. 2d 240 (1944) has been criticized as unduly limiting the powers of the court. Moore and Rogers, Federal Relief from Judgments, 55 Yale L. J. 623 (1946). The court held that it did not have the

power to set aside improper dismissal of an action which had not proceeded within the confines of limitations of time due to the neglect of counsel. However, the court indicated that in a case of error of law apparent, it would have sufficient authority to set aside the dismissal.

It is respectfully urged that although the orders of the Supreme Court denying certiorari were entered October 13, 1947, plaintiffs have not been negligent or guilty of laches in failing to file these motions earlier. The case law distinguishing between substantive and procedural limitations and the effect of fraud in tolling one or both types of statute, has scarcely been pellucid.

The opinion of the Court of Appeals for the Fourth Circuit, in *Scarborough v. Atlantic Coast Line R. Co.*, supra, was entered December 3, 1949, and appeared in the Federal Reporter on January 30, 1950. Plaintiffs have not been guilty of laches in recognizing, by reason of this decision, that error was committed in the instant cases. To hold that an unsuccessful party, to avoid the charge of laches, must go beyond a petition for certiorari and seek a re-hearing of his cause, would be to promote endless and often fruitless litigation. Moreover, the remedy of the bill of review is available only after the time for filing a motion for new trial has expired. *Fraser v. Doing*, 130 F. 2d 617 (C. A., D. C., 1942).

It is not urged that the supervening decision in *Scarborough v. Atlantic Coast Line R. Co.* is grounds for granting the bill of review either as indicative of error or as presenting new matter *in pais*. *Scotten v. Littlefield*, 235 U. S. 407 (1914). It does, however, relieve plaintiffs from the charges of laches or neglect.

The doctrines of stare decisis and the law of the case do not prevent reconsideration upon a motion in the nature of a bill of review. These doctrines are not immutable. *Messenger v. Anderson*, 225 U. S. 436 (1912); *Lebold v. Inland Steel Co.*, 136 F. 2d 876 (C. C. A. 7, 1943). They are but the crystallization of a policy promoting finality of litigation

and certainty of law. But justice and a reconsideration of the law have frequently moved courts to reverse themselves. Note that in *Johnson v. Cadillac Motor Car Co.*, 261 F. 878 (C. C. A. 2, 1919), the court reversed itself after the decision by the New York Court of Appeals in *MacPherson v. Buick*, 217 N. Y. 382, 111 N. E. 1050 (1916). *Swift v. Tyson*, 16 Pet. 1 (U. S. 1842), was still law at that time and law of the state courts. Nevertheless, the federal court was persuaded by the cogent and liberal arguments of *MacPherson v. Buick*, and reversed its previous decision. See also *Higgins v. California Prune and Apricot Growers*, 3 F. 2d 896 (C. C. A. 2, 1924); *Northern Pacific Ry. Co. v. Van Dusen Harrington Co.*, 60 F. 2d 394 (C. C. A. 8, 1932).

This Court has shown little reluctance to overrule itself when an earlier decision has been too narrowly legalistic. In *Lustig v. U. S.*, 338 U. S. 34 (1949), the order of the Court denying certiorari was vacated on rehearing. In *U. S. v. Shaughnessy*, 70 S. Ct. 329 (1950), this Court, having previously denied certiorari to one Eichenlaub, upon consideration of another case which was affirmed upon the authority of Eichenlaub, itself vacated the order denying certiorari and heard both causes.

The order of the Court of Appeals dismissing the motion in the nature of a bill of review in effect unduly limited the power of the court to correct its error and grant the relief obtainable under Rule 60 (b) of the Federal Rules of Civil Procedure.

CONCLUSION.

It is respectfully urged that defendant should not be permitted to avail itself of the defense of the statute of limitations:

1. Because even a substantive statute of limitations may be tolled by extraordinary circumstances such as fraud on the part of the defendant; and

2. Because allowance of the defense of statute of limitations would enable defendant to defeat and nullify the purpose of Sec. 5 of the act.

It is further urged that the Court of Appeals has the authority to correct an error of law apparent on the face of the record and to remand the cause for further hearing.

Respectfully submitted,

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